IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 99-40572**
VAL ELBERT HADDON II and MARIA HADDON,	)	
	)	
Debtors.	)	
_____	)	
	)	
MID-CENTURY INSURANCE COMPANY, Subrogee of: INCLINE TERRACE CONDOMINIUM HOMEOWNERS ASSOCIATION, a corporation,	)	**Adv. No. 99-6160**
	)	**MEMORANDUM OF DECISION RE DEFENDANTS' MOTION TO DISMISS**
Plaintiff,	)	
	)	
vs.	)	
	)	
VAL ELBERT HADDON II and MARIA HADDON,	)	
	)	
Defendants.	)	
_____	)	

Defendants Val Elbert and Maria Haddon, Chapter 7 debtors, move to dismiss this adversary proceeding initiated by Plaintiff Mid-Century Insurance Company ("Mid-Century"). A hearing on Defendants' motion was held on April 5, 2000, after which the matter was taken under advisement.

Facts

Debtors filed for relief under Chapter 7 of the Bankruptcy Code on April 12, 1999. The deadline established by the Clerk for commencing action to determine the dischargeability of debts under 11 U.S.C. § 523(c) was July 20, 1999. On that day, this adversary proceeding was commenced by the filing of a complaint naming Incline Terrace Condominium Homeowners Association ("Incline") as the Plaintiff. The complaint sought a determination that two judgments held by Incline against Defendants should be excepted from discharge under Sections 523(a)(2), (4), and (6) of the Bankruptcy Code.

The judgments stem from Defendants' former employment by Incline as managers its condominium development in Salt Lake City. It is apparently undisputed that while so employed, Defendants embezzled money and converted property belonging to Incline. Incline was insured against such losses by Mid-Continent, which paid Incline $25,000 on its claim. There was a $5,000 deductible on the policy.

In March, 1997, Incline filed a small claims court action against Defendants to recover the $5,000 deductible plus costs. A default judgment was entered in Incline's favor in June 1997, for $5,100. Meanwhile, in April 1997,

and apparently without knowledge of the small claims action, Mid-Continent, asserting its subrogation rights under the insurance policy, filed a second law suit against Defendants in state district court seeking $29,000 in actual damages,[1] plus punitive damages of not less than $10,000. While Mid-continent prosecuted the action, Incline was the named plaintiff in the suit, again as authorized by the policy.

In February 1999, Defendants and Mid-Continent stipulated to the entry of a second state court judgment in Incline's favor for $10,000 thereby resolving the district court action. The parties agreed the stipulated judgment would "supplement and be in addition to the Default Judgment entered in the small claims action . . . ." Paragraph 2, Exhibit J attached to Affidavit of Frank Kotyk.

The original adversary complaint filed in this Court named Incline as plaintiff, and sought a declaration that both the $5,100 judgment and the $10,000 judgment be excepted from Defendants' discharge. Defendants' lawyer undertook negotiations with Incline's attorney. Incline and Defendants thereafter entered into a written "Agreement," signed by Defendants and their attorney on July 26, 1999, and finally signed by counsel for Incline on August 31, 1999. In the Agreement, Defendants contracted to pay Incline $50 per month for 24

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[1] It is unclear from the record how the $29,000 was computed.

months to settle its claims. Paragraph 2, however, recites that the Agreement is "conditioned upon Farmers Insurance not filing an adversary complaint against the debtors in debtors' bankruptcy," something which had already occurred.[2] Defendants made and Incline accepted all the payments required by the Agreement.

Little occurred in the adversary proceeding until November 5, 1999, when an Amended Complaint was filed, substituting Mid-Continent as plaintiff as the "subrogee of" Incline. The Amended Complaint included a few new factual allegations further explaining the relationship between Mid-Continent and Incline. Defendants have answered.

Arguments.

Defendants advance two theories in support of their motion. First, they contend that because the Amended Complaint substitutes a new party-plaintiff (Mid-Continent), it was not timely filed. In the alternative, Defendants assert that Incline's claims have been compromised and settled by the Agreement, which has now been fully performed by their timely payments which have been accepted by Incline.

In response, Mid-Continent argues it is merely stepping into the

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[2] Mid-Continent is a Farmers subsidiary.

shoes of Incline pursuant to its subrogation rights under the insurance policy. It argues that the claim it asserts in the amended complaint is identical to the one set forth in the original complaint, and that allowing the amended complaint to relate back to the original complaint would not prejudice Defendants. Additionally, Mid-Continent contends it is not bound by the terms of the Agreement, and suggests its claims against Defendants are valid since it paid $25,000 on Incline's claim.

Applicable Law

Defendants' motion to dismiss is governed by Rule 12(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Rule 7012 of the Federal Rules of Bankruptcy. However, since the Court has been invited by the parties to consider matters outside the pleadings, including certain affidavits, Defendants' motion will be treated as one for summary judgment, as provided in Rule 56 of the Federal Rules of Civil Procedure, made applicable here by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56.

Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact remaining and the moving party is entitled to judgment as a matter

of law. Fed. R. Bankr. P. 7056; *State Farm Mutual Auto Ins. Co. v. Davis*, 7 F.3d 180, 182 (9th Cir. 1993); *FSLIC v. Molinaro*, 889 F.2d 899, 901 (9th Cir.1989).

Discussion

1. Relation-Back of Amended Complaint

Pursuant to Rule 4007(c), adversary complaints under Section 523(c) must be filed within 60 days following the first date set for the meeting of creditors. Fed. R. Bankr. P. 4007(c). The meeting of creditors was set by the Clerk for May 21, 1999, and the deadline for filing Section 523(c) complaints was July 20, 1999. The original Complaint, filed in the name of Incline only, was timely filed, and sought recovery for both the small claims default judgment and the district court stipulated judgment. The Amended Complaint reveals only two substantive changes. First, Mid-Century is substituted as the Plaintiff, and a few factual allegations were added to describe the relationship between Mid-Century and Incline. Importantly, the substantive factual basis for the claims and relilef requested in both complaints are identical. The issue, then, is whether Mid-Century's Amended Complaint "relates back" to the original Complaint and is therefore timely.

The relevant portions of Rule 15(c) of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Rule 7015(c), provide the following:

> An amendment of a pleading relates back to the date of the original pleading when . . .
>
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

"The basic inquiry is whether the opposing party has been put on notice about the claim or defense raised by the amended pleading." *SEC v. Seaboard Corp.* 677 F.2d 1301, 1314 (9th Cir. 1982). Additionally, Rule 17(a), made applicable in bankruptcy by Rule 7017(a) of the Federal Rules of Bankruptcy provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Mid-Century is correct that as a subrogee, it stands in the shoes of the insured. *Cummings v. U.S.*, 704 F.2d 437, 439 (9th Cir. 1983). Therefore, Mid-Century is the real party in interest in the insured's suit to the extent of its subrogation claim. Fed. R. Civ. P. 17(a), *Cummings*, 704 F.2d at 439. In *Cummings*, an insurer's complaint to intervene in the insured's Federal Tort

Claims Act suit was given "the same effect as a pro tanto substitution of the real party in interest . . . which relates back to the filing of the original complaint." *Id.* at 439-40 (citing Fed. R. Civ. P. 15(c) and 17(a)). Since the substitution related back to the original complaint, the filing came within the six-month time bar of the Tort Claims Act. *Id.* *See also Michener v. Quinn (In re Brady),* 234 B.R. 652, 658 (Bankr. E.D. Pa. 1999) (state fund, which had compensated estate for attorney's misconduct, was allowed to be added as plaintiff after bar date for dischargeability claims; defendant had fair notice because the amended complaint did not introduce new facts or claims).

While the situation in *Cummings* is analogous to the instant proceeding, the Seventh Circuit has analyzed the relation-back issue under facts almost identical to those at bar. In the context of a dischargeability determination under Section 523(c), the court discussed the policy behind the time bar of Rule 4007(c) as requiring creditors to file their complaints within 60 days or yield them forever, so that debtors know the date certain after which no other dischargeability complaints will be made. *FDIC v. Meyer (In re Meyer)*, 120 F.3d 66, 68 (7th Cir. 1997). "The force of Rule 4007(c) therefore should fall first and foremost on whether a complaint was filed against a specific debt, not so much on who makes the complaint." *Id.* Relying upon Rules 15(c) and 17(a)

of the Federal Rules of Civil Procedure, the court allowed the parent company to substitute for the subsidiary, which had erroneously, but timely filed. *Id.* at 68-69. *See also Florida v. Ticor Title Insurance Co. (In re Florida),* 164 B.R. 636, 640 (9th Cir. B.A.P. 1994) (in assessing the dischargeability of a debt, the proper focus is on the nature of the debt rather than the identity of the claimant); *In re Bryer,* 227 B.R. 201, 203 (Bankr. D. Me. 1998) (same). *Meyer* also relied upon the lack of prejudice to the debtor in allowing the amendment as timely. *Meyer*, 120 F.3d 66, 68.

This result is clear under the language of Rules 15(c) and 17(a) and the case law. The proper focus of the Rule 4007(c) time bar should be the nature of the debt, rather than the identity of the claimant. Here, the original Complaint gave Defendants sufficient notice of the claims being asserted, and those claims and the relief requested were identical to those set forth in the Amended Complaint. It is of no significant consequence to Defendants which entity asserts the claims. Finally, Debtors have not alleged, nor can the Court envision, any prejudice which would result from allowing the Amended Complaint to relate back to the date of filing of the original Complaint. The Amended Complaint will not be dismissed on this basis.

2. Compromise of Incline's Claims

Defendants allege they have settled with Incline and, therefore, Mid-Century's claims against them should be dismissed. Mid-Century argues that under the policy, Incline did not have authority to unilaterally settle the claims.

There is no need to determine whether Mid-Century is bound by the Agreement, because the intended effect of that contract is a matter of disputed fact. Even if Incline could settle the small claims judgment, determining what Incline and Defendants intended in entering the Agreement is unresolved on this record. The Agreement was expressly conditioned upon Farmers (Mid-Century) not filing an adversary complaint against Defendant. Therefore, not only is the scope of the Agreement a matter of disputed fact, whether the parties intended the agreement to be valid at all, given that Mid-Century had already begun an adversary proceeding in the name of Incline prior to the execution of the Agreement, is an issue for trial. Because genuine issues of material fact exist, summary judgment is not appropriate on this record.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss will be denied. A separate order will be entered by the Court.

DATED This 21ST day of April, 2000.

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JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
Boise, Idaho 83701

Jay A. Kohler, Esq.
482 Constitution Way, Suite 313
Idaho Falls, Idaho 83402

Frank P. Kotyk, Esq.
P. O. Box 359
Boise, Idaho 83701

ADV. NO.: 99-6160

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk